

Fair Political Practices Commission

Memorandum

To: Chairman Randolph, Commissioners Blair, Downey, Karlan, and Knox

From: John W. Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Subject: Proposal to Merge Government Code section 1090, et seq.,
into the Political Reform Act -- **Status Report**

Date: December 22, 2003

EXECUTIVE SUMMARY

The purpose of this staff memorandum is to update the Commission regarding the proposal to merge other conflict-of-interest provisions, not currently in the Political Reform Act (the “Act” or “PRA”),¹ into the Act. This proposal was first presented to the Commission in July 2003. As we noted in July, there are a variety of conflict-of-interest laws that appear to overlap with the Act.² This creates confusion both about application of the law and responsibility for interpretation of these rules by regulation or by advice letter.

Since that time, staff has received input from interested persons at a January Interested Persons meeting. The comments are summarized below. Staff is now planning to hold additional interested persons meetings as set forth in the attached calendar (**Appendix 1**), and seeks Commission approval.

DISCUSSION

A. Background

As early as 1985, this Commission considered the overlap between the Act and Government Code section 1090. Similar to the Act, section 1090 requires disqualification in some circumstances where a conflict of interest exists, and even provides more severe consequences than the Act in other circumstances. Section 1090 generally prohibits agencies from contracting in cases where a member of the governing body may have a financial interest in

¹ Government Code sections 81000 - 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations. All future references are to the Government Code unless otherwise specified.

² A search of advice letters in the Lexis database revealed approximately 263 Political Reform Act advice letters that make mention of section 1090, the doctrine of incompatible offices, common law conflicts of interest, or the Public Contracts Code.

the contract. In addition to voiding a contract made in violation of its prohibition, section 1090 also provides for felony penalties.³

In a staff memorandum to the Commission dated October 25, 1985, the tension between the Act and section 1090 was discussed.

“The Commission recognized that the two laws overlap, so that there are circumstances where only disqualification of the interested official is required by the Act, but the contract is completely prohibited under Section 1090. In addition, some contracts prohibited under Section 1090 do not even require disqualification under the Act. This can result in Commission staff advising an official that the contract is not prohibited, or that disqualification is not required by the Political Reform Act, when, in fact, the staff suspects that the contract may be absolutely prohibited by Section 1090. This situation causes confusion to officials and to members of the public alike. However, because Section 1090 is not part of the Act, the Commission cannot give advice under Section 1090.”

Support for the merger of the two bodies of law was not universal. In addition to the Attorney General’s office, both the County Supervisors Association of California (CSAC) and the District Attorneys Association (DAA) were hesitant to change the status quo. The CDAA was concerned about potential negative effects on district attorney’s ability to prosecute violations of section 1090 and the CSAC was concerned that administrative regulations would create ambiguity in an existing body of law that was strictly construed by the courts. Ultimately, the Commission chose not to proceed with the project.

On January 1, 1999, the Bipartisan Commission on the Political Reform Act of 1974 was created and charged with assessing whether administrative, regulatory, procedural, and/or clarifying changes to the Act would provide for a more efficient and effective implementation of the Act. The final report of the Bipartisan Commission included the following:

“RECOMMENDATION NO. 16 Consolidation of State Conflict Codes Under One Agency. All state conflict of interest statutes should be consolidated into a single code or body of law to be interpreted and enforced consistently by a single state agency. *Findings Supporting Recommendation:* Based upon the discussions and deliberations of the Commission, the Bipartisan Commission finds that the existence of multiple conflict of interest provisions sprinkled throughout various Codes creates unnecessary confusion in the minds of public officials who strive to obey the law but who often have no idea what Code to review or whom to ask for advice.

“¶...¶”

³ Reference to section 1090 in isolation may be misleading. The comprehensive conflict-of-interest scheme starts at section 1090, and includes sections 1091, 1091.1, 1091.2, 1091.3, 1091.5, 1092, 1092.5, 1093 - 1098.

“For example, a public official wondering whether he or she has a conflict of interest in a particular governmental decision must individually consider the Political Reform Act, Government Code Section 1090, the conflict of interest provisions of the Public Contracts Code, and a number of other agency-specific and local conflict of interest provisions. These provisions are administered or enforced by different agencies such as the FPPC, the California Department of Justice, the courts, and numerous local agencies. The public official must determine for himself or herself what agency to approach for an answer to a conflict of interest question. For example, a question about the Political Reform Act conflict of interest rules must be addressed to the FPPC while a question about a Section 1090 contract issue must be addressed to the Department of Justice.^[4] The Bipartisan Commission therefore recommends that the Legislature consolidate all conflicts of interest laws into one Code, presumably the Political Reform Act, to be interpreted and enforced consistently by a single authority.”

In March 2000, a new effort to link section 1090 to the Political Reform Act was initiated by CalPERS. In their March 6, 2000, letter to interested persons, they stated:

“CalPERS has identified some problems in the day-to-day application of Government Code section 1090. First, CalPERS is concerned with the Attorney General’s interpretation that members of Boards are ‘conclusively presumed’ to have participated in the making of contracts by their staff. Second, CalPERS thinks that the public would benefit from a definition of when an official is ‘financially interested’ in the making of a contract. For example, the definition could mirror the Political Reform Act’s definition of ‘financial interest.’ Last, CalPERS believes the public may benefit from a legislative change that would allow the Fair Political Practices Commission to provide advice regarding Government Code section 1090 and pass regulations interpreting Government Code section 1090.”

CalPERS convened several meetings with various members of the public, representatives of state agencies, and a representative of the Attorney General’s office. Commission staff attended several of these meetings as observers. While the Commission and the Attorney General’s office have not committed to any specific approach in dealing with this issue, all attendees agreed that it would be beneficial to have the Commission explore this proposal.

⁴ See footnote 3.

B. Public Comment

Since the July 2003 Commission meeting, staff has conducted one interested persons meeting. Staff specifically solicited input on the following topics, consistent with the Commission's direction:

1. Scope: There are numerous conflict-of-interest laws that appear to overlap with the Act. Which laws should the Commission choose to move into the Act?

Expressly mentioned in the memorandum for possible inclusion were Government Code section 1090 et seq., Public Contracts Code sections 11410-10430, the prohibition on incompatible activities, common law doctrine of incompatible offices and the doctrine against conflicts of interest, and Government Code section 8920(a) (legislators).

For the most part there was little opposition voiced to the project as a whole. Wayne Strumpfer, representing the California District Attorneys Association (CDAA) voiced concern about incorporating the laws into the Act, although they were not opposed if their concerns (detailed below) could be addressed. A representative from the Public Utilities Commission questioned whether it was practically possible to incorporate the incompatible activities laws in the Act. At most, the enabling statutes would be incorporated, and not the individual agency statements. However, staff agreed this would be more difficult to merge and may provide fewer benefits. There was also comment that the common law doctrine of against conflicts of interests would be difficult to codify.

2. Funding: Obviously, expansion of the Act results in greater workload. If the Commission agreed to support a legislative amendment to add these other laws to the Act, what impacts on workload should we expect?

Comments: A representative from the Los Angeles Ethics Commission stated the workload for the Commission would dramatically increase.

3. Enforcement: Staff of the Commission and of the Attorney General's office agree that exploring the movement of these laws into the Act may be beneficial, but also agree that the conflict-of-interest law should not be diminished in any way. What kinds of impacts on the enforcement division will result from the merger?

Comments: A prosecutor from the Office of the Los Angeles District Attorney expressed opposition to the merger and voiced concerns about losing jurisdiction over felony criminal enforcement. He also voiced concerns about Commission advice making enforcement of the law more difficult.

Mike Martello, representing the League of Cities, suggested a different rule could be developed for section 1090 advice and immunity to address the CDAA's concerns. He also noted advice is not issued pertaining to past conduct. However, the CDAA noted that any advice, even informal advice, or advice based on erroneous facts, could hinder enforcement.

CDAAs stated that statewide prosecutors echoed these concerns. Mr. Strumpfer stated that the prosecutors were not dead-set against the proposal, but that the CDAAs have major concerns.

A representative from the Office of the Los Angeles District Attorney stated that in the last three years, there were approximately 12 to 15 cases related to section 1090 violations. Wayne Strumpfer indicated that was true for the state – prosecutions for PRA violations were rare, prosecutions for violations of section 1090 were more common. He proposed that the FPPC handle the administrative enforcement and leave the criminal enforcement to the DA.

C. Conclusion

Based on the comments received at the interested persons meeting, staff is recommending future focused interested persons meetings as set forth in the attached calendar.